FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-510

UNITED STATES OF AMERICA, Petitioner

v.

STATE OF NEW MEXICO, Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF OF AMICI CURIAE
IN SUPPORT OF RESPONDENT

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I. INTEREST OF AMICI

Congress, in 1891, authorized the President to create national forests by means of the reservation of public lands bearing forests. Creative Act of March 3, 1891, 16 U.S.C. § 471 (1970). In the Organic Act of 1897, 16 U.S.C. § 475 (1970), Congress spelled out the purposes for which national forests were to be established and administered. Basically, two purposes were authorized, the protection of the watershed in order to insure dependable water supplies for downstream appropriators, and protection of the forest in order to secure an adequate and continuous supply of timber. These two purposes, unamended

by federal legislation until 1960, are made even more clear by the legislative history of the two fundamental acts.

Despite the clear language of the Organic Act, and its convincing legislative history, the United States claims that the Supreme Court of New Mexico erred in that it miscontrued the statute in denying the government's claims to reserved water rights to minimum streamflows in the Gila National Forest for recreation and fish purposes. Further, the government asserts it is entitled to reserved rights for use by private forest permittees, despite the fact that Congress provided in the Organic Act that all waters within the boundaries of national forests could be used by private appropriators "under the laws of the state wherein such national forests are situated . . . ." 16 U.S.C. § 481 (1970).

Similar claims are being made by the United States in litigation pending in other western states. See e.g. *State of Washington v. A and C Grazing Co., et al.,* Okanogan County Superior Court No. 17787.Besides being a vital source of timber, national forest system lands are considered the most important watershed areas under any agency of the United States. In the eleven western states, more than half of the streamflow comes from the national forests. C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 211 (1969). Thus, the decision of this Court in the case will have significant ramifications throughout the western states.

The western states joined as *amici* in this brief share the concern for the protection of recreation and environmental values in the national forests espoused by the United States. Moreover, contrary to the cries of alarm sounded by the petitioner, the New Mexico Supreme Court's decision does not preclude both federal and state

initiatives to protect these values through maintenance of minimum streamflows on national forests, nor jeopardize the reserved rights of the United States in national forests throughout the West. But, the determinative issue in this case is the question of for what purposes national forests were to be established and administered according to the Organic Act of 1897. As this Court said recently, "The implied reservation of water doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more . . . ." *Cappaert v. United States,* 426 U.S. 128, 141 (1976).

The *amici* wish to advise this Court of their position that the purposes for which forest lands could be withdrawn pursuant to the Creative and Organic Acts, did not include recreation and protection of fish and wildlife, as the United States urges, and that therefore the New Mexico Supreme Court's decision should be affirmed.

II. QUESTIONS PRESENTED

1) Whether recreation is among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960?

2) Whether the Winters or reservation doctrine provides the United States with rights to the use of whatever amount of water that might be needed to serve individuals making private uses of the forest lands as permittees of the Secretary of Agriculture?

3) Whether "fish purposes" were among the authorized purposes for which the Gila National Forest lands

were or could have been withdrawn from the public domain, prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960?

III. SUMMARY OF ARGUMENT

The Gila National Forest lands were withdrawn pursuant to the Organic Administration Act of 1897 for the purposes of securing favorable conditions of water flows below the watershed and to provide a continuous supply of timber. That these were the only purposes for which national forest lands could have been withdrawn under the Organic Act is evident from the language of the Act itself, as well as its legislative history. Forest Service administrators have interpreted the Organic Act consistent with this construction of the purposes for which national forest lands could be withdrawn from the public domain.

The relevant case law also supports the proposition that reserved rights in a national forest arise only for purposes of watershed protection and timber maintenance, prior to enactment of the Multiple-Use Sustained-Yield Act in 1960. The Multiple-Use Act provided for supplemental purposes for national forests, including recreation and fish and wildlife, as of 1960. However, the language of the Act itself and its legislative history make clear that the Act does not provide a basis on which to predicate reserved rights for instream uses on national forests prior to its enactment.

The United States is also not entitled to reserved rights for uses made by private individuals on forest lands. It is clear that use of water by private persons on forest lands is governed by the principles of prior appropriation under state law. Continuing to recognize state laws for private

uses on forest lands will not place an unreasonable burden on federal range management.

New Mexico has suggested several alternatives for the federal government to secure the rights to minimum stream flows which it seeks in this litigation. Furthermore, the New Mexico Supreme Court decision, if upheld, will do nothing to preclude the exercise of state prerogatives under existing laws to maintain minimum flows on forest lands in the West.

Rather than an attempt to ignore environmental values, the New Mexico Supreme Court decision should thus be seen as simply a recognition of the purposes for which forest lands could be withdrawn from the public domain according to the unambiguous language of the Organic Act of 1897.

IV. ARGUMENT

A. The original purposes for reserving Gila National Forest Lands were to secure favorable conditions of water flows below the watershed, and to provide a continuous supply of timber.

1. *The language of the Organic Administration Act of 1897 and its legislative history make clear that Congress intended to authorize establishment of national forests only for the purposes of timber management and watershed protection.*

The United States asserts in its petition that if the New Mexico Supreme Court's decision is allowed to stand, it "will jeopardize the reserved water rights of the United States in national forests throughout the West." Petition,

p. 6. This statement is completely contrary to the record of this case. From the pretrial conference, New Mexico agreed that the United States "has a right to water under the reservation doctrine to the extent that such right satisfies the purposes for which the federal lands were withdrawn and to the extent that waters were unappropriated and available to be so reserved." (Pre-Trial Order, Tr. 231). Likewise, the New Mexico Supreme Court agreed that the principle of reserved water rights applies to the Gila National Forest Lands. In so doing, the Court cited the recent opinion of this Court in *Cappaert v. United States,* 426 U.S. 128 (1976), in which the Court stated:

> ". . . [W]hen the Federal Government withdraws its land from the public domain and reserves it for a Federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." 426 U.S. at 138.

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the Court concluded:

> "the issue is whether the government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created . . . ." 426 U.S. at 139

However, as is clearly indicated in this Court's explanation of the reservation doctrine in *Cappaert,* the conclu-

sion that the United States did exercise its powers to reserve waters for the Gila National Forest is only the initial step in the analysis. Mere recognition of the right does nothing to define its scope, as is required by the reservation doctrine. Thus, this Court in *Cappaert* stated further as follows:

> "The implied reservation-of-water doctrine, however, reserves only that amount of water to fulfill the purpose of the reservation, no more." *Id.* at 141.

Thus, in order to define the scope of the reserved right as it exists in favor of each reservation, an additional question must be determined, namely, "What are the purposes of the reservation to be served by the reserved right?" The language of the acts under which the Gila National Forest lands were withdrawn, as well as their legislative history, conclusively demonstrates that the Gila National Forest lands could have been withdrawn only for purposes of watershed protection and timber maintenance.

The national forest system was created by Congress in the Creative Act of 1891, 26 Stat. 1103, 16 U.S.C. § 471 (1970). This Act provided in pertinent part:

> "The President of the United States may, from time to time, set apart and reserve in any state or territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

The Act does not refer to the purposes of the national forests. Nevertheless, the overriding concern for timber management and watershed protection was the focus of the floor debates leading to the passage of the Creative Act. Mr. Flower, a Representative from New York, speaking in favor of passage of the Act stated:

> "The more you preserve the timber at the headwaters . . ., the better you will be able to restrain the floods at its mouth and along its banks, and the better you will be able to protect the property of the people living in its fertile valleys.
>
> . . . .These streams someday or other will be diverted from their beds for irrigtaion purposes, and will make fertile the lands in the Rockies and the Nevadas, besides which it will prevent a great deal of suffering from overflows.
>
> The more careful the preservation of the timber at the fountainheads of the streams, the better it will be for the West and the South and for the people who live in the valleys through which these great rivers flow.
>
> . . . Now, Mr. Speaker, I think that the man who cuts trees on the headwaters of these streams in such a way as to seriously diminish the timber commits a crime against the western farmer." 22 Cong. Rec. 3616 (Feb. 28, 1891).

Because the Creative Act was unclear as to the purposes for which forest reserves could be created, and also failed

to provide a system of administration for the reserves, Congress passed the Organic Administration Act of 1897, 30 Stat. 35, 16 U.S.C. § 475 (1970). Among the provisions of the Act was a clear statement of purposes for which forest reserves could be established:

> "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States."

This statement of purposes clearly demonstrates that the forests were designed to conserve the watershed for the benefit of water users below the forest as well as to preserve the bountiful supplies of timber therein from destruction. The language is devoid of any reference to recreational, aesthetic, or wildlife or fish purposes. Thus, an objective appraisal of the text of the provisions of the Organic Act does not allow for the broad interpretation espoused by the United States.

Despite the clear limitation of forest purposes found in the provisions discussed above, the United States contends that 16 U.S.C. § 551 indicates that Congress envisioned broader purposes than those stated therein. Originally passed as part of the Organic Act of 1897, 16 U.S.C. § 551 empowers the Secretary of Agriculture to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."

As noted previously, one of the major deficiencies of the Creative Act of 1891, which the Organic Act was

designed to remedy, was the former's failure to provide a basis for regulation and administration of forest reserves. Thus, Section 551 authorized rules and regulations to regulate the occupancy and use of the forests and preserve them from destruction. Thus, in order to ensure that the forests achieve their objects or purposes (watershed protection and timber preservation), regulation of the various internal activities in the forests was essential. Otherwise, those activities or uses could interfere with the paramount forest objects or purposes.

Congress surely knew that many uses would and could be made of the forests. Indeed, the Organic Act permitted ". . . any person [to enter] upon such national forests for all lawful and proper purposes . . ." so long as there was compliance with rules and regulations adopted under 16 U.S.C. § 551. However, Congress at the same time recognized that all *uses* of the forest would need to be regulated to ensure the achievement of the specific statutory purposes of the Organic Act. Consequently, the thrust of 16 U.S.C. § 551 is to regulate forest uses, not to somehow equate forest uses with forest purposes.

The United States also seeks to find support for their interpretation of the Organic Act in its legislative history. However, the congressional debates and committee reports pertaining to the Organic Act support the construction that the purposes of the national forest were envisioned by Congress to be economic rather than recreational or aesthetic. This is clearly displayed in a statement by Representative McRae of Arkansas, who was one of the chief sponsors of the Organic Act. He said:

> "The objects for which the forest reservation should be made are the protection of the forest growth against fire and ax, and

> preservation of forest conditions upon which water conditions and water flows are dependent. The purpose, therefore, of this bill is to maintain the favorable forest conditions, *without excluding the use* of these forest reservations for other purposes. They are not parks set aside for nonuse, but have been established for economic reasons." 30 Cong. Rec. 966., (May 10, 1897) (emphasis added).

It follows from this statement that recreation, while considered a proper forest use, was clearly rejected by Congress as a forest purpose. The forests were not to be parks set aside for non-use. They were intended to protect the watershed for the benefit of irrigators and other economic users and to preserve a supply of timber. The concept of maintaining minimum streamflows or lake levels to fulfill various non-economic purposes was clearly not intended.

The "Report of the Committee on the Inauguration of the Forest Policy," Sen. Doc. No. 105, 55th Cong. 1st Sess. 1897, also emphasized the functions of the forests as protectors of the watershed and sources of timber supply:

> "Your committee is of the opinion that it is not only desirable but essential to national welfare to protect the forested lands of the public domain, for their influence on the flow of streams and to supply timber and other forest products . . . .
>
> It is the opinion of your committee that, while forests probably do not increase the precipitation of mositure in any broad and

> general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of western America is dependent upon irrigation." *Id.* at 8.

The United States asserts that the use of the words in the Organic Act ". . . to improve and protect the forest within the boundaries . . . ," by Congress in its statement of forest purposes, expands the original purposes of the forest beyond those of watershed protection and timber preservation. It contends that this phrase encompasses recreational and other purposes not otherwise explicit in the Act. However, the words of the Act are clear as to the meaning of this phrase. At best, the phrase can be read to relate to the need to regulate and protect the forests in order that they may achieve their purposes as protectors of the watershed and sources of timber supply. Nothing in the Organic Act indicates that the purposes of the forest were to be greater than those. To so construe the cited phrase would expand the meaning of the Act beyond its own limits.

That Congress intended the twin purposes of watershed protection and timber preservation for national forests is further evidenced in the enactment of the Weeks Act of March 1, 1911, ch 186, 36 Stat. 962. The Act authorized and directed the Secretary of Agriculture to:

> ". . . examine, locate, and recommend for purchase such forested, cut-over, or denuded lands within the *watersheds of navigable* streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of

> timber . . . ." 16 U.S.C. § 515 (1970). (emphasis added)

Later, by the Act of June 7, 1924, 43 Stat. 655, 16 U.S.C. § 570 (1970), Congress authorized the Secretary of Agriculture to ascertain the location of public lands "chiefly valuable for stream-flow protection or timber production, which can be economically administered as parts of national forests" and to report his findings to the National Forest Reservation Commission, which had been established by the Weeks Act. Upon a Commission determination that the administration of said lands by the federal government would "protect the flow of streams used for navigation or for irrigation, or will promote a future timber supply," then the President was to lay the findings of the Commisssion before Congress for action toward their inclusion in forests. *See* C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 200-202 (1969). Thus, Congress continued to recognize that the creation and protection of the national forests were solely for the purposes of preserving timber supplies and protecting the watershed for downstream users.

2. That the Creative and Organic Acts authorized the withdrawal of national forest lands only for purposes of timber management and watershed protection has historically been recognized by forest land administrators.

Despite the plain language of the Organic Act and its convincing legislative history, the United States contends that the construction of the Act by various administrators indicates that Congress intended broader purposes. It is settled that the practical construction of a statute or act of

Congress, *fairly susceptible of different constructions,* by those charged with the duty of executing it is entitled to great weight. *Eg. Udall v. Tallman,* 380 U.S. 1 (1965); *Zemel v. Rusk,* 381 U.S. 1 (1965). It is submitted, however, that the Organic Act is not fairly susceptible of differing constructions as to the purposes for national forests. Moreover, the administrative construction of the Organic Act supports the decision of the New Mexico Supreme Court, despite the contentions of the United States to the contrary.

Shortly after the passage of the Organic Act, the Department of the Interior, which was given the control of the "forest reserves," promulgated rules and regulations governing forest reserves established under the authority of the Creative Act of 1891. These rules and regulations were promulgated less than a month after passage of the Organic Act and reiterate the purposes which had already been set forth clearly in the Act. For example, Regulation 2 provided that public forest service reservations are established "to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and ensuring conditions favorable to continuous water flow." 24 L.D. 589 (June 30, 1897).

In 1906, the Department of Agriculture published its Forest Reserve Use Book. On page 13, the Use Book stated:

> "Forest reserves are for the purpose of preserving a perpetual supply of timber for home industries, preventing destruction of the forest cover which regulates the flow of streams, and protecting local residents from unfair competition in the use of forests and range.

> We know that the welfare of every community is dependent upon a cheap and plentiful supply of timber; that a forest cover is the most effective means of maintaining a regular streamflow for irrigation and other useful purposes, and that the permanence of the livestock industry depends upon the conservative use of the range." *The Use of the Forest Reserves,* p.13 (1906).

It is for the preservation of these forest purposes that the rules and regulations mentioned in the Use Book were required. Thus, the Use Book continues:

> "The continued prosperity of agricultural, lumbering, mining, and livestock interests is directly dependent upon a permanent and accessible supply of water, wood, and forage, as well as upon the present and future use of these resources under business-like regulations, enforced with promptness and effectiveness, and common sense." *Id.*

The Forest Service itself recognized the basic purposes of national forests as established by the Organic Act in the Report of the Chief Forester in 1913. The report stated:

> "The national forests are set aside specifically for the protection of water resources and the production of timber . . . ." p. 10.
>
> . . . The aim of administration is essentially different from that of a national park, in which economic use of material resources

comes second to the preservation of natural conditions on aesthetic grounds." p. 11.

In support of its positions, the United States cites several administrative manuals, letters, and other documents dealing with recreational, aesthetic, scenic, and wildlife and fish *uses* of the forests. From an examination of these citations it cannot be denied that recreation and related uses have been considered proper and lawful uses of the forests. As an example, the United States cites from page 8 of the 1902 Forest Reserve Manual to the effect that:

> "All law abiding people are permitted to travel in forest reserves for the purpose of prospecting, surveying, to go to and from their own lands or claims, or for pleasure and recreation."

Rather than constituting an expanded administrative interpretation of the purposes of the national forests, this section merely recognizes that persons may enter the forests for lawful reasons, including recreation. The section cannot be read, however, as an administrative expansion of the forest *purposes.*

The United States also places reliance on a statement in the Use Book that:

> ". . . hotels, stores, mills, summer residences and similar establishments will be allowed upon reserved lands wherever the demand is legitimate and consistent with the best interests of the reserve." *Use of the National Forest Reserves,* p.49 (1905).

But again, this statement stands for the proposition that certain recreational, and related uses may be allowed if consistent with the best interests of the forest. It does not establish the use as a purpose.

In summary, it is not argued that recreation, fishing and hunting and other related activities are not appropriate uses subject to regulation by the Forest Service. Indeed, the Organic Act has always allowed lawful and proper uses on the forest. The provisions advanced by the United States, however, cannot be understood to expand forest purposes. Indeed, if examined in context, the sources cited by the United States support the contrary conclusion.

3. Case law does not support the proposition that reserved rights in a national forest arise for purposes other than watershed protection and timber maintenance.

The United States cites several cases which it claims support its contention that various agency-sponsored uses have been judicially affirmed as valid forest purposes. However, an examination of these cases reveals that none of them indicate that forests were established for any but the limited purposes of watershed protection and timber preservation. Rather, the cases support the distinction recognized by the New Mexico Supreme Court between proper forest uses subject to regulation, and purposes for which its forest lands may be withdrawn.

For example, the government cites *McMichael v. United States,* 355 F. 2d 283 (9th Cir. 1965), in support of its contentions. In that case, the defendants challenged the validity of certain regulations, stating that, since they were not designed to protect the forests from destruction, they

were beyond the authority of the Secretary to adopt. The court, however, upheld the regulations on the theory that the Secretary's authority to regulate occupancy and use of the forests was not confined to regulations necessary to preserve the forests from destruction.

Nevertheless, the court did not say anything that would indicate that recreation was somehow made a purpose of the forest because it was a lawful, regulable forest use. Instead, the court recognized that administrative interpretation of the Organic Act has always always viewed recreation as no more than a legitimate *use*. Thus, the court stated:

> "The consistent administrative interpretation of Section 551, has been that while recreational considerations alone will not support the establishment of a national forest, they are appropriate subjects for regulation." 355 F. 2d at 285.

The United States advances this Court's decision in *Arizona v. California,* 373 U.S. 546 (1963), as the most compelling in support of its assertion that recreation and other uses are valid purposes for which the Gila National Forest lands were withdrawn from the public domain.

The United States relies heavily upon the following statement made by the Master in *Arizona v. California,* 373 U.S. 546 (1963):

> "There are eleven national forests in the lower Colorado River Basin. They were established for the following purposes: (1) the protection of watersheds and the maintenance of natural flow in streams

> below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public." Report of Special Master, p. 96.

This was the only time the Master touched upon the subject of national forests purposes in his long report. Furthermore, unlike the Master, the Supreme Court did not specifically address the issue of the purposes of the national forests.

In its opinion in *Arizona v. California,* this Court made the following statement about the Master's resolution of the reserved rights claims of the United States:

> "We approve his decision as to which claims required adjudication, and likewise we approve the decree he recommended for the government claims he did decide. We shall discuss only the claims of the United States on behalf of the Indian reservations." 373 U.S. at 595.

Regarding the Master's decree, the Supreme Court said:

> "While we have in the main agreed with the Master, there are some places we have disagreed and some questions on which we have not ruled. Rather than adopt the Master's decree with amendments or append our own decree to this opinion, we will allow the parties, or any of them, if they wish, to submit before September 16, 1963, the form of decree to carry this opinion into effect, fail-

> ing which the Court will prepare and enter an appropriate decree at the next Term of Court." ID., at 602.

The decree ultimately adopted by this Court made no reference to the purposes for which national forests were established. *See Arizona v. California,* 376 U.S. 340 (1964). Rather, the decree to the Gila National Forest (in the Gila River drainage) reserved waters sufficient ". . . to fulfill the purposes of the Gila National Forest . . . ." *Id.* at 350. The purposes were not enumerated, just as they were not litigated. Thus, the Court's holding, in effect, does no more than state the basis of the issue now before the Court; that is, what are the purposes of the Gila National Forest to which reserved rights appropriately appertain.

Furthermore, an examination of the transcript itself indicates that the Special Master did not have the question of valid forest *purposes* before him when he issued the statement set forth above. The footnote to the Master's statement refers the reader to that portion of the transcript upon which the Master based his finding, two pages of testimony of B. Russell Lyon, Chief of Hydraulics and Water Improvement for the Intermountain Region of the National Forest Services *Arizona v. California,* Tr. pp. 16014-16015). Mr. Lyon's testimony clearly indicates he was talking about forest uses, not purposes:

> "Q: Mr. Lyon, generally what are the uses which are made of he national forests?;
> A: The national forests are used for . . . ."

Thus, the question of whether recreation and other forest uses were valid forest purposes within the meaning of the Organic Act was neither raised nor determined,

even by the Master. In light of the fact that this Court's opinion in *Arizona v. California* is devoid of any reference to forest purposes, and in view of the qualifications which this Court placed on its approval of the Master's findings and conclusions, it cannot be tenably argued that *Arizona v. California* settled the issues in this case.

Other than the decision by the New Mexico Supreme Court in this case, the most recent decision construing the purposes for which lands can be withdrawn from the public domain to establish national forests came in the consolidated cases in the state district court in Colorado resulting from this Court's decisions in *United States v. District Court in and For the County of Eagle, et. al.,* 401 U.S. 520, (1971) and *United States v. District Court in and For Water Division No. 5, et. al.,* 401 U.S. 527 (1971). The Special Master in these cases is Mr. Michael White, a visiting water law professor at the Denver University School of Law. Noting the essence of the Organic Act of 1897, Mr. White concluded that:

> ". . . The statement of purposes clearly indicates that the forests were designed to conserve the watershed for the benefit of water users below the forest as well as to preserve the bountiful supplies of timber therein from destruction. No mention is made of any recreational, aesthetic, or wildlife and fish purposes established by the Organic Act of 1897. The words of the statute are clear and no broader interpretation or effect can be made than that which appears on their face. *Partial Master-Referee Report Regarding the Claims of the United States of America,* 200-201.

4. The Multiple-Use Sustained-Yield Act does not provide a basis on which to predicate reserved rights for instream uses on national forest lands prior to its enactment in 1960.

The United States contends that enactment in 1960 in the Multiple-Use Sustained-Yield Act demonstrated that Congress intended in the Creative and Organic Acts that national forests be established for more than the purposes of timber production and watershed protection. The government contends in effect that the Multiple-Use Act reaffirmed and codified the administrative policy of the Forest Service which the government contends support its assertions of reserved rights for broader purposes. However, neither the Multiple-Use Act nor its legislative history indicate that Congress intended the Creative and Organic Acts to sanction withdrawal of forest lands from the public domain for any other purposes than for timber preservation and watershed protection.

In pertinent part, the Multiple-Use Act provides:

> "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of Sections 528-531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established and set forth in Section 475 of this title." 16 U.S.C. §528 (1970).

This language demonstrates that the Multiple-Use Act was intended to establish new and additional purposes for the forests as of the date of its enactment in 1960. In light

of its express statement that the purposes which it establishes are supplemental to those of the Organic Act, it cannot be read as a reaffirmation of a pre-existing congressional policy.

The legislative history of the Multiple-Use Act supports this conclusion. The report of the House Committee specifically addressed the language set forth above. It stated:

> "Thus, in any establishment of a national forest, purposes set out in the 1897 Act must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest [under the 1960 Act] if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 Act." House Rept. No. 1551, or House Rept. 10572, April 25, 1960, 86th Cong. 2nd Sess. p. 4.

The House Report thus expressly recognizes the limited purposes of the Organic Act and explains that the new purposes set out in the Multiple-Use Act are "additional." It necessarily follows that they did not exist under the terms of the Organic Act.

The Committee Report also recognized that recreation was merely a lawful and regulable use of the national

forests under the Organic Act. A letter from E. L. Peterson, Acting Secretary of the Dept. of Agriculture, which was included in the report, stated in part:

> "The authority to administer recreation and wildlife habitat resources of the national forests has been recognized in numerous appropriation acts and comes from the authority contained in the Act of June 4, 1897, to regulate the "occupancy and use" of the national forests." *Id.*

The Court in *West Virginia Div. of Izaak Walton League v. Butz,* 522 F. 2d 945 (4th Cir. 1975), reached the same conclusion:

> "In effect appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds . . ."
>
> ". . . [T]he Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language: "The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897." (U.S.C. §475.).
>
> ". . . From our review of the material at hand we are satisfied that in enacting this legislation Congress did not intend to jettison or repeal the Organic Act of 1897. We are equally satisfied that this Act did not

> constitute a ratification of the relatively new policy of the Forest Service . . ." 522 F. 2d at 953-54.

In summary, neither the Multiple-Use Act nor its legislative history can be read as an expansion of the limited purposes of the Organic Act, but only as an expansion of purposes for national forests as of 1960.

B. The United States is not entitled to reserved water rights for the purpose of providing water for private uses on the forest lands by permittees of the Secretary of Agriculture.

The United States also asserts reserved rights for uses made by private individuals on forest lands, namely stockowners. However, it is clear that use of water by private persons on forest lands is governed by the principles of prior appropriation, despite the withdrawal and reservation of the lands for special government purposes.

Congress provided in the Organic Act of 1897 that:

> "All waters within the boundaries of national forests may be used for domestic mining, milling, or irrigation purposes, under the laws of the state wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder." 16 U.S.C. §481 (1970).

Based on the above provision, the 1936 Forest Service manual provided that "rights to the use of water for na-

tional forest purposes will be obtained in accordance with state laws."

Reservation doctrine rights later emerged side by side with prior appropriation rights, and along with the rights of miners and others who occupied and used national forest lands, the government had the right to the use of so much water as was implicitly necessary to satisfy the purposes for which the lands were withdrawn.

In contrast to the contention of the United States that it is now entitled to reserve rights to water for private uses on forest lands, the Forest Service continued to recognize that private rights as opposed to government reserved rights, must be obtained under state law. Thus, the Forest Service maintained its requirement that any water-storage or water-transmission permittee on national forest lands obtain a state water right permit. Forest Service Handbook § 2755.54 (Sept. 1958); *See* C. Wheatley and C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 207 (1969).

The United States complains that the decision of the New Mexico Supreme Court, consistent with the above principles, would require each stockowner holding a federal grazing permit to obtain an individual adjudication of his or her water rights under state law. (Petition p. 19). However, as New Mexico points out in its brief in opposition to the government's petition:

> "The district court's decision provides for the adjudication of rights to permittees when the facts will show that the water uses have been made by them instead of the Forest Service. With respect to stock water, New Mexico law provides that up to ten

> acres may be impounded without the necessity of obtaining a permit. Of the 22 claims to water rights for stock watering purposes made by the United States, none would require an impoundment of more than ten acre feet. New Mexico law places no limit on annual consumption from such impoundments . . ." Brief of the State of New Mexico in Opposition, p. 6, fn. 4.

C. The New Mexico Supreme Court Decision does not preclude or hinder the ability of the United States or the western states to reserve minimum streamflows to protect wildlife, recreational, environmental, and aesthetic values on National Forest Lands.

The United States criticizes the New Mexico Supreme Court decision on the basis that it denies the United States essential reserved water rights and thus "will threaten the ecology and restrict the use of more than 7 million acres of national forest land in New Mexico, and would jeopardize the reserved water rights of the United States national forests throughout the West." ". . . The court's decision, unless reversed, will impede the husbandry and inhibit the use of our national forests." (Petition, p. 6).

In fact, the New Mexico Supreme Court decision does not preclude or inhibit federal and state initiatives to secure minimum streamflows to protect recreational, wildlife, and other values of the national forests. Indeed, the State of New Mexico has suggested several alternatives by which the United States could properly predicate reserved water rights for recreation and fish purposes. For example, New Mexico suggests the Forest Service could

submit its claims under the Multiple-Use Sustained-Yield Act of 1960. Brief of the State of New Mexico in Opposition, p. 17. The Multiple-Use Act provides that as of 1960 national forests shall "be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes."[1]

In this regard, the recent decision of the Master in the consolidated cases in state district court in Colorado resulting from this Court's decisions in *United States v. District Court in and For the County of Eagle, et. al.,* 401 U.S. 520 (1971), and *United States v. District Court in and for Water Division No. 5,* 401 U.S. 527 (1971), is again illuminating. While the Master found, consistent with the New Mexico Supreme Court decision, that the United States did not have reserved water rights for minimum streamflows for recreation and fish and wildlife purposes on the basis of the Organic Act of 1897, he concluded that the Multiple-Use Act did not apply only to forests established after the date of its enactment, but to all forests existing as of that date as well. Further, the Master found as follows:

> "Under the reservation doctrine, water is available to accomplish the purposes of the reservation. As of June 12, 1960, the Multiple-Use Act broadened the purposes of the national forests. Thus, as of that date, reserved water could be utilized in sufficient amounts to satisfy the outdoor recreation, range, and fish and wildlife purposes of the national forests. Prior to that date, it was not, and could be utilized only to achieve the

[1]. In *State of Washington v. A and C Grazing Co.*, the general adjudication referred to *supra*, the referree submitted a report to the Superior Court confirming to the United States a 1960 priority for instream flows relating to fish, wildlife, and recreation uses involving national forest lands.

> Organic Act's purposes of improving and protecting the forest, watershed protection, and timber preservation and supply." *Partial Master-Referee Report Regarding the Claims of the United States of America,* 237-38.

New Mexico has outlined additional alternatives of establishing such rights by withdrawing the forest lands pursuant to the National Parks Service Act, or by executive order transferring the lands to the National Parks Service for concurrent administration under the Act. New Mexico suggested in the alternative that the United States could withdraw the beds and banks of the Rio Mimbres and its tributaries under the Wild and Scenic Rivers Act of October 2, 1968, 16 U.S.C. §1271, et. seq.(1975).

If the New Mexico Supreme Court decision is upheld by this Court, it will also not preclude the exercise of state prerogatives to establish minimum streamflow on National Forest lands. Indeed, in spite of intense competition for water in the West, a number of western states have taken significant steps to protect instream values. R. Dewsnup and D. Jensen, *State Laws and Instream Flows* (Prepared for Fish and Wildlife Service) (1977). These state strategies include legislative protection of scenic rivers, legislative designation of quality streams, statutory moratorium on new appropriations, legislative assignment of use rights to a state agency, direct reservation of instream flows, administrative moratorium on new appropriations, statutory criteria to protect instream values, conditions on water use permits, transfers, and exchanges, appropriations by a state agency, appropriations held in a trust for other uses, acquisition and re-allocation of water rights, statewide water plans, state environmental

policy acts, and state fish and wildlife coordination acts. *Id.*

It is thus evident that the states share the concern for recreation and fish and wildlife values that the United States evinces. Moreover, many strategies are available to the states, and indeed have been employed in many instances by the states, to protect such instream values.

Thus, despite the cries of alarm raised by the United States in its brief, the New Mexico Supreme Court's decision should not be seen as a subtle attempt to ignore environmental concerns, but rather as an objective appraisal of the purposes for which the Gila National Forest lands could have been withdrawn pursuant to the Organic Administration Act of 1897.

CONCLUSION

The purposes for which the United States is entitled to reserved rights on the Gila National Forest lands are contained in the Organic Administration Act of 1897. These purposes are protection of the watershed for downstream users, and preservation of the timber supply. Nothing in the legislative history, the administrative interpretation or in the case law, supports the government's contentions that Congress intended broader *purposes* for the national forests, as opposed to lawful *uses* of national forest lands. In the Multiple-Use Sustained-Yield Act of June 12, 1960, Congress expanded the purposes as of that date to include recreation and wildlife and fish purposes. As the Multiple-Use Act itself states, these additional purposes were supplemental to, and not in derogation of the original purposes enumerated in the Organic Act of 1897.

Provisions of the Organic Act, subsequent case law, and the administrative interpretation by the Forest Service itself, support the conclusion reached by the New Mexico Supreme Court that private users on national forest lands must obtain water rights in compliance with the state law in which the national forest lands are situated.

A ruling upholding the New Mexico Supreme Court's decision will not impair the ability of the United States to protect such instream values as recreation and fish and wildlife. Several alternatives available to the United States have been suggested by New Mexico to accomplish this objective in the Gila National Forest lands. The existence of western state laws to protect such values further belies the contention of the United States that the New Mexico Supreme Court's decision impedes the husbandry and inhibits the use of our national forests.

The New Mexico Supreme Court's decision represents an objective interpretation of the purposes for which the Gila National Forest lands could have been withdrawn pursuant to the Organic Act of 1897. The decision should be affirmed.

It should be noted that the position that the Multiple Use Sustained Yield Act of 1960 entitles the United States to reserved rights with 1960 priorities for such purposes as recreation, fish and wildlife is not necessarily shared by all of the western states joined as *amici curiae* in this brief.

Respectfully submitted,

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